SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October TERM, 1974

No. 74-729

GEORGIA-PACIFIC CORPORATION,
Petitioner

versus

JANE E. REILLY (LEBRUN),
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE

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October Term, 1974

GEORGIA PACIFIC CORPORATION

Petitioner

versus

JANE E. REILLY (LEBRUN)

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner prays that a Writ Of Certiorari issue to review the Judgment of The Workmen's Compensation Appeals Board of the State Of California entered in the above-entitled case on June 11, 1974, which became final by the denial of a hearing by the Supreme Court Of The State Of California on September 12, 1974.

CITATION TO OPINION BELOW

Respondent, Jane E. Reilly (LeBrun),

as the result of a single car accident, filed an Application with The Workmen's Compensation Appeals Board, said action resulting in a Findings And Award in respondent's favor. The Decision of The Workmen's Compensation Appeals Board of Los Angeles, California, is annexed hereto as Appendix "A". A timely Petition For Reconsideration was filed in the appropriate manner, resulting in an affirmation of the Findings And Award. The Decision of The Workmen's Compensation Appeals Board, Opinion And Order Denying Reconsideration is annexed hereto as Appendix "B". The petitioner's timely Motion For A Hearing in the California Court Of Appeals was denied. The Decision of the Court Of Appeals is annexed hereto as Appendix "C". A Petition taken to the Supreme Court For The State Of California, for a hearing, was denied on September 15, 1974. The Decision of the Supreme Court Of The State Of California is annexed hereto as Appendix "D".

JURISDICTION

The Judgment of The Workmen's Compensation Appeals Board was entered on March 26, 1974. Said Judgment having become final

by reason of the denial of a hearing by the Supreme Court Of The State Of California. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1957 (3).

QUESTIONS PRESENTED

1. Were petitioner's rights, as guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, violated when The Workmen's Compensation Appeals Board held that the one-year Statute Of Limitations for the bringing of a claim for adjudication was waived by furnishing respondent group health insurance benefits through Prudential Life Insurance Company, and that those health insurance benefits were deemed Workmen's Compensation benefits?

2. Was the petitioner's right, as guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, violated when the Workmen's Compensation Appeals Board of the State Of California, in effect, legislated that group health benefits for petitioner's employees shall be deemed compensation benefits, thereby affecting the petitioner's activities throughout the several states;

and was this judicial legislation in conflict with the Commerce Clause?

3. Has The Workmen's Compensation Appeals Board Of The State Of California impaired petitioner's obligation of contract by finding that the furnishing of group health plan benefits for nonindustrial injuries tolls the one-year Statute Of Limitations under the Labor Code?

4. Was petitioner deprived of substantive and procedural due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution, violated by The Workmen's Compensation Appeals Board holding that there was proper notice of a compensable industrial injury and a lack of prejudice to the employer thereof, where no actual notice was given until the filing of the Application For Adjudication Of Claim more than two years after the alleged accident, thereby depriving petitioner of an opportunity to investigate and defend same?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the Constitution Of The United States; the pertinent provisions of

Article I Section X of the Constitution Of The United States; the pertinent provisions of Article 1, Section 8, Clause 3, the Commerce Clause, and the pertinent provisions of the Labor Code of the State of California are set forth in Appendix "E", attached hereto.

STATEMENT OF THE CASE

Respondent, Jane E. Reilly (LeBrun), was involved in a single car accident on February 16, 1971.

On March 28, 1973, the respondent filed a claim to recover compensation. During this interim period respondent collected benefits under a nonindustrial group health insurance plan, with Prudential Life Insurance Company.

Thereafter, on October 2, 3 and 4, 1973, a hearing was held at The Workmen's Compensation Appeals Board before the Honorable Referee Romaine E. Harper. A Finding And Award was issued, in respondent's favor, the subject of which creates the need for the questions presented herein.

HOW FEDERAL QUESTION PRESENTED

The constitutional objections being

made by petitioner at this time were raised in the following way: First, petitioner raised said objections by properly raising the issues in the Answer to respondent's Application For Relief before The Workmen's Compensation Appeals Board, the Answer being filed May 14, 1973. Again during trial, objections were raised, both by oral objections during trial and written argument. (Testimony book 3, page 70, lines 1 - 23 and 26; page 71, lines 1 - 11 and 17 - 26; page 72, lines 1 - 9.) Said objections, based on prejudicial lack of notice and the one-year Statute Of Limitations as a bar, in addition to the basic defense of nonindustrial injury, was asserted again in defendant's argument and Points And Authorities submitted for consideration pursuant to the Court's Order on October 29, 1973. Said Constitutional objections were reasserted, after the Board held for respondent in their Findings And Award, attached hereto as Appendix "A", in petitioner's Petition For Reconsideration.

These issues were reasserted before the California Appellate Court and California Supreme Court, both having denied a hearing. (Appendix "C" and "D").

FACTS RELEVANT TO QUESTION 1:

The applicant's automobile accident occurred on February 16, 1971. On March 28, 1973 an Application was filed with The Workmen's Compensation Appeals Board Of The State Of California. California Labor Code, Section 5405(11(b), amended 1947) states, "the period within which may be commenced proceedings for the collection of benefits provided by Article II or III or both, of Chapter II of Part II of this Division is one year from: (a) The date of injury; or (b) The expiration of any period covered by payment under Article III of Chapter II of Part II of this Division; or (c) The date of last furnishing of any benefits provided for in Article II of Chapter II of Part II of this Division." Almost every jurisdiction has attempted to clarify when the Statute Of Limitations will be tolled by payment of compensation. The problem arises when trying to define said terms.

In the case at bar, we are faced with a situation whereby the applicant received benefits from a nonindustrial medical health policy (emphasis added), the amount being paid totalling well over $25,000.00. The Workmen's Compensation Appeals Board held

that the furnishing of said medical benefits tolled the Statute Of Limitations; that it tolled the Statute Of Limitations with respect to Georgia-Pacific Corporation because Georgia-Pacific Corporation contributed, in part, to the premiums on said health policy.

The Court, in Caterpillar Tractor Company vs. Industrial Commission, 210 N.E. 2d 215, and Craig vs. Palisades International Park Commission 281 New York Supplement 2d 387, held that one factor that may affect this type of case is the extent to which the noncompensation system is coordinated with the compensation system; if the noncompensation payments stand as an offset to compensation liability, this undoubtedly makes it easier to hold that such a payment tolls the Statute.

In the case at bar the group medical health coverage used by respondent is solely for nonindustrial injuries. The application for, and use of, said benefits over a two year period, after the accident, indicates respondent's knowledgable affirmation of a nonindustrial injury.

The group health insurance afforded respondent was independantly administered and handled by the Prudential Life Insur-

ance Company, and was in no way, coordinated with petitioner's self insurance administration of Workmen's Compensation benefits for employees, through petitioner's home office in Portland, Oregon.

In holding that the Statute Of Limitations was tolled by inaction on the part of petitioner, under these circumstances The Workmen's Compensation Appeals Board has manifestly stated that due process of law as applied to petitioner is irrelevant because petitioner is not required to have asserted knowing, voluntary and affirmative action to be held liable.

In Kentucky Franklin vs. Blue Grass the Kentucky Court held exactly contrary to this position. The Court was confronted with the question of whether the payment of medical expenses by the employer was a voluntary payment of compensation within the provisions of their said Code. The Court referred to a prior case decided by the Supreme Court Of Kentucky, Pipes Chevrolet vs. Bryant 274 S.W. 2d 663, where the Court recognized that varying results have been reached in other jurisdictions. That Court held that the employer's payment of part of the hospital bill was not voluntary payment

of compensation so as to toll the Statute Of Limitations. (Emphasis added).

It is petitioner's contention that a contrary holding would completely thwart the purposes of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Petitioner respectfully submits that the purpose of said one-year Statute Of Limitations is precisely to comply with the due process requirements of the United States Constitution. However, where the Court binds an employer, by holding that payment of part or all of the premiums on a nonindustrial health insurance policy is the equivalent of compensation, for the purpose of tolling the Statute Of Limitations, then due process has not been complied with.

FACTS RELEVANT TO QUESTION 2:

Petitioner, Georgia-Pacific Corporation, has continuing business relations in many of the several States of the United States. Petitioner contends that it is a manifest deprivation of due process and equal protection to allow the California Workmen's Compensation Appeals Board, in effect, to judicially legislate petitioner's rights and responsibilities in its dealings with employees as to health or compensation bene-

fits in all States.

Petitioner is required to comply with numerous different regulations in each State. There are a significant number of States holding that the payment of compensation does not necessarily toll the Statute Of Limitations for purposes of Workmen's Compensation. U.S. Casualty Company vs. Owens 137 S.E. 2d 543, Georgia; Miles vs. General Electric Company 280 S.W. 2d 529, Kentucky; Garcia vs. New Mexico State Highway Department, New Mexico; Pipes Chevrolet vs. Bryant 274 S.W. 2d 663; Stern vs. Pechard Motors 178 N.W. 61, Michigan; Biddix vs. Rex Mills Incorporated 75 S.E. 2d 777, North Carolina; Sam's Place vs. Middleton 103 South 2d 312, Arkansas; and Marshall vs. Pletz 317 U.S. 383, 63 Supreme Court 284, 287, Law Edition 348. There are contrary rules in various other States, many of which uncompromisingly hold that payment of any compensation will toll the Statute. See Workmen's Compensation by Larson.

As a consequence of the variety of jurisdictions in which petitioner does business, it is engaged in substantial interstate commerce. Although the Workmen's Compensation rules and laws may differ from State to State,

the effect of health insurance, through the Prudential Insurance Company, has been heretofore uniform. As a result of the instant case, petitioner is now faced with an unequal treatment in California with far-reaching effect upon dealings in other States.

It has been repeatedly held that where a State, by its judicial process, affects interstate commerce, that regulation must fail. In the case at bar, The Workmen's Compensation Appeals Board has, by its ruling, affected the contracts for nonindustrial health insurance throughout the country, insofar as it affects the business relations between Georgia-Pacific Corporation and Prudential Life Insurance Company.

Justice demands that this Court rule on this question, so as to insure equal protection of the law throughout the several States, and so as to obviate California judicial control of interstate commerce.

FACTS RELEVANT TO QUESTION 3:

The United States Constitution, Article I, Section X states, "no State shall pass any Bill of attainder, ex post facto law or law impairing the obligation of contracts (emphasis added)...."

Georgia-Pacific Corporation entered into a contract with the Prudential Life Insurance Company for the purpose of providing nonindustrial group health plan benefits to its employees. At the time of contract, the obligations of all concerned parties were clearly defined by the contract itself. The obligation of the Georgia-Pacific Corporation was solely to pay premiums. As a result of the decision in this matter, by the California Workmen's Compensation Appeals Board, the obligations under the petitioner's contract with Prudential Life Insurance Company have been grossly enlarged, and, at the same time, impaired.

New liabilities were added that were not within the contemplation of the contracting parties. In Kentucky Utility Company vs. Carlisle Ice Cream Company, 279 Kentucky 585, 131 S.W. 2d 499, it was enunciated that any law which changes the intention and legal effect of the contracting parties, giving to one a greater or the other a lesser interest or benefit of the contract, impairs its obligation.

In the present action, the California Workmen's Compensation Appeals Board found that payment of the aforementioned nonin-

dustrial medical health benefits tolled the one-year Statute Of Limitations for Workmen's Compensation purposes. The practical effect of that decision, in fact the actual holding of that decision, was that payment of the premiums themselves constituted compensation so as to toll the one-year Statute of Limitations.

This State-imposed liability is clearly unconstitutional, in that it impairs the obligation under petitioner's contract with Prudential Life Insurance Company.

FACTS RELEVANT TO QUESTION 4:

Respondent testified that pursuant to her normal working hours, her work day ended at 5:00 P.M. On the day of the accident, respondent testified that she left work approximately 4:15 in the afternoon in order to run a work-related errant. Transcript October 2, 1973, page 81, lines 8 and 9, and page 147, lines 11 -26. Respondent's task was to buy some items for a party to be held the following day.

The respondent had decided, prior to leaving work on the date in question, to purchase these items at a stationary store in a nearby shopping center. Testimony re-

vealed that the shopping center in question was only a short distance from Georgia-Pacific Corporation, and therefore the travel time was very short, approximately 15 minutes. Transcript October 2, 1973 page 121, line 10.

The respondent testified that she went directly from work, at approximately 4:15 in the afternoon, to the shopping center, in order to purchase these itmes. The evidence shows that Miss Reilly did some window shopping and/or browsing in the shopping center after accomplishing these errands, and, in fact, consummated the purchase of a dress. Transcript October 2, 1973 page 150, line 4 and 5.

It was not until approximately 6:40 P.M. that evening that respondent was involved in a single-car accident. Because of the times involved and the plain fact of an accident on a freeway, involving respondent, it would be extremely unlikely that anyone would correlate the accident with a work-related activity.

The California Workmen's Compensation Appeals Board's finding, in effect, was a finding on two separate issues. The first being that Georgia-Pacific Corporation had

actual knowledge and notice of a work related injury within the 30 day period required by the California Labor Code, Sections 5400 - 5402.

As was brought out by respondent, in her case in chief, it was common knowledge (emphasis added) the day following the accident that Jane E. Reilly (LeBrun) was involved in an automobile accident the previous night. Respondent claims that this common knowledge is the equivalent of knowledge and notice of a compensable work-related injury. From the evidence, this is an impossible legal deduction.

This point has been heavily litigated throughout the country. In Royal Indemnity Company vs. Coulter, 213 GA 227, 279; 98 S.E. 2d 899, 901, the Georgia Court held that in order to comply with the notice provisions of the Code Section "the employee or his representative must give notice of an injury by accident arising out of and in the course of employment, and mere notice that an employee is suffering from an injury from an accident does not meet the requirements of the Statute." In Wilson vs. Navajo Freight Lines, Inc., 73 NM 470, plaintiff was a long haul driver for defendant. On

December 7, 1960, while defendant and another were driving a truck for defendant corporation, plaintiff suffered a heart attack in Cameron, Missouri, requiring his hospitalization there for some 35 days, after which he was returned to Albuquerque by airplane, the ticket having been arranged by the employer.

Admittedly, no written notice was given until after the 30 day period had elapsed. It was conceded, that defendant's superiors had knowledge of plaintiff's hospitalization very shortly after the occurrence. The question presented to the Supreme Court of New Mexico was this: Did this amount to such knowledge as to relieve plaintiff of the obligation to give written notice within 30 days?

The Court held that such knowledge was not the quivalent of notice. They went on to say mere notice to the employer that the employee became sick cannot be considered actual notice of injury within the provisions of the act excusing notice.

The Wilson case appears on all fours with the case at hand. In our case, the applicant suffered an injury resulting from an accident at 6:40 P.M. As was

stated previously, it was common knowledge at Georgia-Pacific Corporation that said accident had occurred. Yet this was not tantamount to knowledge that a compensable injury had occurred, and certainly not tantamount to notice, written or otherwise. (Emphasis added).

In order to meet the dictates of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, if no written notice is given to the employer as required by the California Labor Code, it must be shown that the absence of such notice was not prejudicial to the employer.

Petitioner contends that it was absolutely essential that an opportunity to investigate the witnesses and the scene of the accident exists. As was previously stated, this opportunity to investigate and prepare a defense did not come until some two years after the accident had occurred.

The respondent in the case at hand alleged she was on company business until just prior to the time of the accident. As previously stated, there is evidence that respondent pursued a course of conduct that was purely personal prior to leaving the shopping center on the night in question.

It would be absolutely essential for the employer to be able to investigate these facts and to question all relevant witnesses as to whether or not respondent's business errands were the sole reason for her tardiness on the date of the accident, or even to establish a time and place correlation between work and injury.

One of the only California cases related to the general problem presented in the instant case, Lockheed-Aircraft Company vs. Workmen's Compensation Appeals Board (Cranch) 38 CCC 227, established the need for and importance of an adequate defense to the issues of compensable injury, notice and prejudice for lack thereof, and the applicability of these issues to the one-year Statute Of Limitations. There can be no proper defense mustered unless a defendant employer is given adequate notice and opportunity to prepare and investigate.

Petitioner further contends that the trial referee, of the California Workmen's Compensation Appeals Board, denied specific procedural due process in refusing admission into evidence of defendant's Exhibit O (marked for identification only) (See Certified Record) which constituted

substantial evidence of a continued pattern of action by respondent and her representatives in the treatment of this injury as nonindustrial. In fact, respondent's counsel, the trial referee, the California Workmen's Compensation Appeals Board and the reviewing Courts were misled in considering respondent's (applicant's) Exhibit 6 (marked for identification only) as admitted evidence to establish notice. The actual testimony of the affiant, Phillip Douglas Kelly, at the time of trial was not, as represented in the affidavit (applicant's Exhibit 6 for identification only). The combined effect of the denial of admission into evidence of petitioner's (defendant's) Exhibit O, and the treatment of respondent's (applicant's) Exhibit 6 as evidence, was a gross miscarriage of justice and denial of procedural due process.

The dictates of the Due Process Clause, from both a procedural and a substantive viewpoint, requires that actual notice and actual opportunity exist for the defendant to investigate the possibility of a compensable injury within the prescribed time limits as set forth in the California Labor Code. The California Workmen's Compensation

Appeals Board decision has prejudiced petitioner and thereby denied petitioner due process, in holding that the required knowledge of a compensable injury was shown, or that there was no prejudice to petitioner from lack of knowledge or proper notice thereof.

REASONS FOR GRANTING THE WRIT

This Application For A Writ Of Certiorari presents to the Court two distinct problems. The primary problem presented herein concerns the denial of constitutional rights by the lower courts.

On the issue of whether or not the notice provisions of the Labor Code were adhered to the California Workmen's Compensation Appeals Board made two rulings. They first ruled that there was notice given within the 30 day period as required by the Code, and alternatively, if notice was not given, there was no prejudice that would be necessary in order to invoke the defense in favor of the employer.

On the issue of notice it must be shown that there was actual written notice of a compensable injury. Although there was an awareness of the applicant's automo-

bile accident, there was also an awareness that this accident occurred after business hours at approximately 6:40 P.M. Nowhere can it be asserted that any person had actual or even implied knowledge, or notice, that this automobile accident could be considered a work-related injury.

As to whether or not prejudice existed, the Court would be hardpressed to justify that a delay of more than two years between the date of injury and the first notice that a work-related injury was claimed, said notice coming in the form of an Application For Adjudication Of Relief before The Workmen's Compensation Appeals Board, can be anything but prejudicial.

It would be manifestly unjust to allow the California Workmen's Compensation Appeals Board holding that a two year delay in investigating these facts was not prejudicial, especially in light of the procedural misconduct of the trial referee toward petitioner's evidence.

Petitioner's constitutional right to due process of law has again been violated by holding that payment of the premiums for a nonindustrial health insurance policy constituted compensation for purposes of

tolling the one-year Statute Of Limitations. Due process of law, for all purposes, requires knowing and voluntary action. By holding that a merely ministerial task, that of making a payment for the premiums on a health insurance policy, constituted such action as heretofore described, is a clear violation of due process of law as contained in the Fourteenth Amendment of the Constitution Of The United States.

A further violation of petitioner's constitutional rights occurred, since the California Workmen's Compensation Appeals Board's holding grossly increased petitioner's burdens under the contract between itself and Prudential Life Insurance Company. As heretofore mentioned, the State is bound not to disturb said contract unless for purposes of protection of the general health and welfare of the citizens of said State. Such has not been demonstrated in the case at bar, hence the State has unjustly tampered with petitioner's obligations and rights under said contract.

The second problem presented by this Petition is the gross unfairness and denial of equal protection of the law as set forth inthe Fourteenth Amendment of the

Constitution Of The United States, in that the California Workmen's Compensation Appeals Board is judicially legislating in this case so as to affect substantially petitioner's business in interstate commerce.

For the reasons herein stated, it is respectfully requested that this Petition For Writ Of Certiorari be granted.

Respectfully Submitted,
ROWEN AND SWANSON

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APPENDIX A

WORKMEN'S COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CASE NO. 73 L. A. 381-497

JANE E. REILLY, also known as JANE E. LE BRUN,	)	
Applicant,	)	FINDINGS AND AWARD
vs.	)	
GEORGIA PACIFIC CORPORATION, a corporation,	)	
Defendant.	)	

Rose, Klein and Marias, by Howard N. Lehman, applicant's attorneys.

Rowen and Kanter, by Kenneth H. Rowen, defendant's attorneys.

****

Application having been filed herein, all parties having appeared, and the matter having been regularly submitted, the Honorable ROMAINE HARPER, Referee, finds and awards as follows:

FINDINGS OF FACT

1. Jane E. Reilly, also known as Jane E. Le Brun, born August 18, 1949, while employed as a secretary, on February 16, 1971, in the City of Industry, California, by Georgia Pacific Corporation, a corporation, permissibly self-insured, sustained multiple injuries arising out of and occurring in the course of her employment.

2. Applicant's earnings were then $413.50 per month.

3. This injury caused temporary total disability beginning February 17, 1971 through October 11, 1971, at $58.93 per week, in the total sum of $1,995.20.

4. This injury caused temporary partial disability beginning October 12, 1971 through November 14,1971 and again beginning February 27, 1973 through August 21, 1973, with wage loss in an amount to be adjusted by the parties or determined herein upon filing of petition and supporting documents.

5. Defendant is allowed credit for sums paid as salary during periods of temporary disability in an amount to be adjusted by the parties or determined herein upon filing of petition and supporting documents.

6. This injury caused permanent disability of 81-3/4%, equivalent to $52.50 per week for 327 weeks, and thereafter a life pension at the rate of $26.35 per week.

7. Further medical treatment is required to cure or relieve from the effects of injury.

8. Defendant did not fail to provide medical treatment to cure or relieve from the effects of this injury after notice of need.

9. Applicant reasonably, actually and necessarily incurred expense for medical reports of Alan J. Glasser, Ph.D., in the sum of $260.00, of Melvin L. Schwartz, M. D., in the sum of $225.00; of Charles Aronberg, M. D., in the sum of $130.00, of Armin M. Sadoff, M. D., in the sum of $405.00, of Herman C. Schoen, M. D., in the sum of $234.00, and of Daniel McCaskill, M. D., in the sum of $200.00, to prove a contested case.

10. This claim is not barred by the Statute of Limitations.

11. Applicant incurred reasonable litigation expense under Labor Code Section 5710, in the sum of $100.00.

12. The reasonable value of the services of applicant's attorneys is $2,600.00.

A W A R D

AWARD IS MADE in favor of Jane E. Reilly, also known as Jane E. Le Brun against Georgia Pacific Corporation, a corporation, of the sum of $1,995.20 as temporary disability indemnity, payable forthwith, together with temporary partial disability indemnity on a wage loss basis as provided in Finding No. 4, less credit for sums paid as provided in Finding No. 5; together with permanent disability indemnity in the sum of $17,167.50, payable at the rate of $52.50 per week beginning on August 29, 1973 and weekly thereafter until paid, and thereafter a life pension at the rate of $26.35 per week; together with reimbursement for medical-legal expense in the sum of $1,454.00; together with reimbursement for litigation expense in the sum of $100.00; together with further medical treatment; less sums payable to lien claimants, whose liens are hereby allowed as follows: $260.00 to Alan J. Glasser, Ph. D., $225.00 to Melvin L. Schwartz, M. D.; $130.00 to Charles Aronberg, M. D.; $405.00 to Armin M. Sadoff, M. D., $234.00 to Herman C. Schoen, M. D., $200.00 to Daniel McCaskill, M. D., and $2,700.00 to Rose, Klein and Marias.

Executed on: MAR 26 1974

Referee

WORKMEN'S COMPENSATION APPEALS BOARD

All parties served by mail on said date as shown on Official Address Record.

COURT PAPER STATE OF CALIFORNIA STD 113 REV 8 72

73 LA 381-497

RECEIVED

ROWEN & KANTER

CASE NO. 73 L.A. 381-497

JANE E. REILLY aka JANE E. LE BRUN vs. GEORGIA PACIFIC CORP. et al

Referee: ROMAINE HARPER
Date: March 22, 1974 Injury: February 16, 1971

OPINION ON FINDINGS AND AWARD

This claim is not barred by the Statute of Limitations. Application, although filed more than one year from date of injury, was filed less than one year from last furnishing of medical treatment for the injury under the employer's group insurance plan, the premiums for which were paid by the employer (see summary of testimony of Robert L. McCallister on October 4, 1973, page 2, lines 26-27, and page 4, lines 13-15).

It is found that the injury arose out of and occurred in the course of applicant's employment. Applicant was on a business errand for her employer to purchase supplies for a company dealers' meeting to be held the next day. The fact that she picked up a dress which she had ordered especially to wear to the dealers' meeting did not constitute a personal deviation. Even if considered purely personal, the dress errand was in the same shopping complex as the store in which applicant shopped for her employer, so no deviation occurred. The accident occurred just as applicant entered the freeway by a ramp adjacent to the shopping complex.

Applicant's earnings at date of injury were $413.56 per month, including overtime (see Exhibit M).

This injury caused temporary total disability beginning February 17, 1971 through October 11, 1971 and temporary partial disability beginning October 12,1971 through November 14,1971, and further temporary partial disability beginning February 27, 1973 through August 21, 1973 with wage loss in an amount to be adjusted by the parties or determined herein upon petition, less credit for sums paid as salary while applicant was off work subsequent to injury (see Exhibit M, summary of applicant's testimony concerning part-time work after termination by defendant in Minutes of October 2, 1973, page 9, lines 1-9, and report of Dr. Sadoff dated August 21, 1973).

This injury caused permanent disability of 81-3/4% (see reports of Drs. Sadoff, Aronberg and Schwartz). There is no basis for apportionment. Defendant's motion to strike the rating is denied. Cosmetic deformity was rated at moderate in accordance with the referee's impression upon viewing the applicant. There is no basis for the implication in defendant's argument that the cosmetic defects in applicant's eye and mouth are anything but constant and permanent. There is no basis for defendant's argument that applicant's throat scars have no influence upon her ability to compete (see summary of applicant's testimony on October 2, 1973, page 8, lines 11-12, to the effect that "people talk to the scar instead of talking to me, etc....").

Further medical treatment is required (see reports of Dr. Sadoff and Dr. Schwartz).

According to the testimony of applicant's mother, applicant paid for part of her visits to Dr. Tashma, and applicant's father was a patient of Dr. Tashma's. There is no evidence that defendant failed to provide adequate medical treatment for the injury; and it is found that defendant did not fail to provide medical treatment for this injury after notice of need.

Romaine Harper

ROMAINE HARPER, Referee

RH:md

APPENDIX B

WORKMEN'S COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RECEIVED

JUN 13 1974

MONEN & HAMMER

JANE E. REILLY, also known as JANE E. LE BRUN, Applicant, vs. GEORGIA PACIFIC CORPORATION, a corporation, Defendants.	CASE NO. 73 LA 381-497 OPINION AND ORDER DENYING RECONSIDERATION

Defendant employer, permissibly self-insured, petitions for reconsideration raising the issues, inter alia, of the referee's erroneous assumption of the location of the accident, of injury arising out of and occurring in the course of her employment, substantial deviation from any reasonable employment-connected activity, employee's estoppel, permanent disability rating, and employer's requirement that applicant use her own automobile. Defendant employer also raised the further issue: "Is there any weight or merit to be given to applicant's argument that she was compensated for her time required to pick up the items she claimed as it relates to the question and issue of injury", and further, "Is not the applicant bound in this case by many of the same principles which would apply in the law of Agency?"

After review of the record and in reliance upon summaries of applicant's testimony of October 2, 3, and 4, 1973, the summary of the testimony of Margaret J. Easton of March 13, 1974, and the

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Report of the Referee on Petition for Reconsideration dated May 6, 1974, we are of the opinion that defendant's petition should be denied for the reasons hereinafter stated.

Respecting her accident on February 16, 1971, applicant testified as follows:

> "At the time of her accident her maiden name was Reilly. She was married on September 16, 1972.
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> "She saw all of the doctors who have reported for her and has not paid any of the bills.
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> "She had never been hospitalized before this injury. She did not have the scars on her neck and her abdomen before this injury. She never lost time from work because of illness or injury before this injury. She has had no subsequent injuries. She fell out of an automobile when she was 8 years old but had no injuries except a couple of scrapes. She was taken to a Dr. Kaufman and X rayed. She had no problems from that accident at all.
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> ". . .
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> "At the time of her injury, she was Phillip Douglas Kelly's private secretary but does not remember how long she had held that position. Her duties were to answer his telephones, do light typing, assist him with his work, do the stock received reports. 'Q. What is that? A. I am trying to remember it. It had to do with stock that was received from various companies they bought for.'
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> "She did the petty cash summary report. She picked up mail every morning around 9:00 a.m. (leading question).
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> "She arrived at work by 7:30 a.m., although her regular hours were from 8:00 a.m. to 5:00 p.m. At about 9:00 a.m. every morning she drove to the post office, a few blocks away, to pick up the mail.
>
> "On February 17, 1971, there was to be a dealers' meeting, which is a promotional meeting to which they invite all of the accounts to the office. They had a sale on of plywood paneling

which they were going to feature at the meeting. They had a bar and a buffet dinner set up (referring to a prior dealers' meeting witness attended). Defendant company paid for food and drinks. Name tags were given out at the door. All of defendant's sales people attended and actually sold merchandise at the meeting.

". . .

"She planned to attend the meeting on February 17, 1971, and two weeks before had selected and made a down payment on a new dress in a shopping center in Hacienda Heights. The dress cost about $25.00, and she thinks she paid about $10.00 down. Next door to the dress shop was a donut shop and next door to that a stationery shop. When she selected the dress, she looked in the stationary shop and noticed it had a good variety of guest books and pen and pencil sets.

"Witness was to have picked up a registration book and door prizes for the dealer meeting, consisting of a Cross pen and pencil set, and a pen. Mr. Kelly told her to. On February 16, 1971, after lunch or a little later, Mr. Kelly gave her this assignment and told her to purchase the items that day because the meeting was the following day and there would be other errands to run.

"Witness thinks she went into his office later that afternoon and asked to leave a little early to avoid the middle of traffic. It was raining. Mr. Kelly told her she could leave at about 4:30 or 4:45 p.m., she thinks. He knew she was going to get the dealer meeting guest book and gifts. He never told her where to go to buy the objects but left that up to her.

"She had been driving her father's pick-up truck since she was a senior in high school and drove it to school that year. She drove the truck from her office in the City of Industry to the shopping center that is in Hacienda Heights where she purchased the guest book and prizes at the stationery store. She remembers the station ry store man talked to her and made her laugh. Then she picked up her dress. She remembers laying the stationery parcel on the counter of the dress shop when she wrote the check for the balance of the purchase price of the dress. She remembers it was raining hard by that time, and she took the dress on a hanger in a cellophane bag such as cleaners use.

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"She paid for the guest book and pens with cash which she took out of the petty cash box. She thought she prepared a receipt; she usually does. She was the one who was responsible for the money and had to explain shortages. She was given a receipt at the stationery store. She would have returned the change to the petty cash box in the office if she had not had her accident.

". . .

"When she left the dress shop, she turned the truck around and got on the Pomona Freeway. The most direct route from the shopping center to her home would be the Pomona Freeway to the 605 Freeway, the 605 Freeway towards Los Angeles, getting off at Temple City Boulevard. She was heading home to meet Susan Mercurio to go to church pursuant to arrangements made by telephone after Applicant had left her office.

"She does not remember what caused the accident or where it took place. She does not remember the accident at all.

"She had three brain surgeries in the hospital, as well as a tracheostomy and gastrostomy, tube in her stomach. She is almost blind in her right eye. Looking straight ahead, she is blind in her right eye. She is right-handed.

"She was unconscious for two months in the hospital and understands she had nurses around the clock. She came home with a nurse.

"Prudential Life Insurance Company paid $22,000.00 of her $26,000.00 medical bills under defendant's group health plan, the balance of which she and her family paid. She has incurred additional expenses.

"At the time of the accident, defendant paid the premiums for this insurance. When Applicant started working for defendant, she paid part of the premium and the employer paid part of the premium for the group health insurance. Defendant commenced paying all of the premium after she had worked there a little over a year, sometime in 1969 or 1970.

"After the accident she received unemployment compensation disability for 6 months at the same

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time she was receiving her full salary from defendant for two months following the injury, or through April 1971, although she did not work. Mr. Kelly authorized the continuance of her salary. He was branch manager and was over about 40 people.

". . .

"PRESENT COMPLAINTS: She has had trouble with her memory since this accident. The doctors told her the first brain surgery was for removal of a blood clot the size of an egg. The second night they removed a second blood clot and a bone from the right temporal area (indicating), then three weeks later they put the bone back in her head. This was the third brain surgery. She was given dilantin. She is almost blind in her right eye. She thinks very slowly and has trouble grasping things and does not retain information. If she does not write everything down, she forgets it. She has uncontrollable yawning frequently (this is evident throughout the hearing). Her equilibrium is poor, and she staggers when she walks. She has an occasional drink but cannot drink a lot because of instructions following her brain surgery. She has almost fallen at least once or twice a day. If she gets up too fast from a chair, she loses her balance and must hold on to something. Mathematics is difficult for her now.

". . .

"She has a scar which drives her crazy. People talk to the scar instead of talking to her. Every morning she looks in the mirror and wishes the scar was not there. The scar is about 4 inches long and 1/4 inch wide. She does not feel like herself. She used to have a lot of pep, and now she does not have it. She has a nagging pain in her low back about 3 or 4 inches above her waist, all the way across from side to side. She has constant pain in her right shoulder, from 'bursitis.'

"She has back pain about 50% of her waking hours, mostly in the evening. Her husband massages her back, which helps. The pain is aggravated a little bit by lifting groceries weighing approximately 10 pounds. If she can sit down for 15 or 30 minutes, the pain stops. The right shoulder pain is like a hot iron being applied to the shoulder at all times. She uses a hot pack on it and went to a sauna bath as a guest once, which helped.

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"Her left foot was broken, and when she walks around the block her left ankle gives out and sometimes the right ankle given out. The ankles just turn. She cannot wear a closed shoe but must have the toe and heel open. If her feet get closed in, it feels like something is pinching the skin. She cannot stand over 30 minutes, then must sit down because she feels she will fall and must sit for 10 or 15 minutes before she can stand again.

"She has noticed facial weakness on the left side. She had some electrical treatment at the hospital, but the left lid droops, they say, even though her surgery and the electrical treatments were on the right side.

"When she talks about her right shoulder, she means the right thoracic area of the back (indicating). Dampness in the air makes her pain stronger. These are all her complaints.

"She thinks it was October 1971 when she returned to work for defendant and that she worked about one year after she returned. She is confused. She worked about one and a half years after she returned to work following the accident and then was laid off because her work wasn't up to the best of her ability, and they did not have time for somebody like that. She was trying her best, but they said she was not doing her work as well as the other girls. Mr. Kelly was no longer there when she returned to work.

"She has worked since but has had a hard time holding a job. They say she is not fast enough and does not comprehend things, and things do not stay with her. She has worked for two different companies, both of which laid her off. Thereafter, she worked for a temporary service and has been called out on three jobs. She worked for one company for three weeks, for another company two weeks, another for one week, another for four or five days, and another for two days, and has not worked otherwise.

"TREATMENT: She is still seeing Dr. Beehler every six months."

Ms. Susan Mercurio testified that she and applicant's father drove in her car to see the truck that was in the accident and to

look for applicant's watch. The truck was in a yard where wrecked cars are taken by the City of Industry. They did not find applicant's watch in the truck but did find the guest book and a new dress with tags on it. There was a pen on a chain attached to the book.

Phillip Douglas Kelly testified that he was the manager of the City of Industry branch at the time of the accident and that the applicant was his personal secretary. Mr. Kelly testified as follows:

> "Defendant company had put on an annual dealers' meeting for about 5 years and had one scheduled for February 17, 1971. The purpose of the meeting was to present new products to lumber dealers in the area for possible sale. It was to be a dinner held at the California Country Club. They expected about 200 lumber dealers to attend, at defendants' expense.
>
> "All of the girls in the office (4 of them including Applicant) were invited to this dinner, so that no feelings would be hurt, but Applicant was required to attend for the purpose of getting to know customers. Applicant talked to people on the telephone concerning orders, and some of these people had asked witness what Applicant looked like. One of the office girls usually participated in the drawing and awarding of door prizes at this annual affair, but it had not been decided which girl would do this on February 17, 1971. Other employees required to attend the dinner were the switchboard operator, the accounts receivable clerk, all sales personnel, but not the cardex girl.
>
> "On February 16, 1971, witness instructed Applicant to obtain door prizes (usually a pen set) and a registration book for the meeting the following evening. They were both in the office, and it was around 4:15, 4:30, while her usual quitting time was 5:00 p.m. He asked if she had made arrangements for the door prizes, and she said yes. No one else was present at the conversation. He said why didn't she go pick them up right then. She asked if she could leave, and he said yes. She left.

"She was to be paid for the time she spent getting the prizes and also to be paid overtime for her attendance at the dealers' meeting. The door prizes were to be purchased out of the petty cash fund, which is money belonging to defendant company, but witness does not recall whether Applicant took money from the fund before going out to do the shopping, nor does he recall whether Applicant or some other girl was in charge of the petty cash fund that week. There were two cash funds in the office, (1) the petty cash and (2) the receipts on sales, each handled by a different person. He believes Applicant was in charge of the petty cash fund in February 1971. The one taking petty cash is supposed to make out a slip but sometimes they would buy the things with their own money and bring back a receipt. The fund was replenished monthly.

"He does not recall what, if anything, was said about paying for the items, or whether he handed Applicant petty cash on the spot - - - no recollection one way or the other.

"He does not know whether Applicant planned to return to the warehouse with the items that night or whether she planned to take them home with her and keep them overnight and bring them in the next day. She would have been free to do either. He recalls it was a rainy day and it was dark at the time he and Applicant had their conversation.

"Witness was told in the office at 8:00 a.m. the next morning that Applicant had had a bad accident and was in the hospital. It was common knowledge in the office when he arrived.

"Applicant had not returned to work by the time witness left the company.

"Witness had authority to and did authorize the continuance of Applicant's salary while she was off work, to help her defray medical expenses and because she had been a good employee. He informed the regional manager, Bob Smith, of his decision within a few days after the accident. Witness does not know if Applicant stayed on the payroll after witness left the company. Mr. Smith said, 'Fine.' Witness does not know what other branch managers would do in such a situation.

"With respect to employees earning more than

applicant, possibly around 400 and up, he thinks, there was insurance to take over after they had been absent for 30 days, but Applicant did not have a high enough salary to qualify for this plan.

"Defendant company had a group medical policy with Prudential Insurance Company at the time of Applicant's accident. Witness is not sure whether the company paid the entire premium or only part of it. He cannot recall this even as to his own medical insurance he had with the company.

". . .

"The dinner meeting was a command performance for all the girls in the office, except the cardex girl, as any one who answered witness' telephone had to attend."

On March 29, 1973, applicant filed a claim for benefits which was well within one year from the date of the last furnishing of medical treatment for the injury. (See summary of testimony of Robert L. McCallister on October 4, 1973, Page 2, lines 26-27, and Page 4, lines 13-15.)

Based upon the testimony of applicant and the former manager of the City of Industry branch offices, Mr. Kelly, applicant was instructed by him to obtain door prizes (usually a pen set) on February 16, 1971, and a registration book for the meeting the following evening. Kelly told applicant on the afternoon of February 16, that she should go and pick them up right away, whereupon she left. Kelly said she was to be paid for the time she spent getting the prizes and also to be paid overtime for her attendance at the dealers' meeting the next day. Kelly also testified that the attendance of the girls at the meeting was a "command performance" for all concerned.

Applicant further testified (Page 4, lines 23-24) that the defendant's group medical insurance carrier continued to pay for her medical treatment until some time after she was laid off. She believes that the defendant's medical group stopped paying when she filed her application in April, 1973. Applicant further testified that when she returned to work the group insurance carrier again started paying Dr. Beehler's bills.

From our review of the evidence, it is clear that applicant, when injured, was on a "special errand" for her employer, mainly to purchase door prizes for the dealers' meeting to be held the following day.

As for the deviation from her "special errand", the applicant testified that the dress shop was two doors away from the stationery shop where she purchased the guest book and prizes for the company. She then picked up her dress, got into her truck, turned it around and got on the Pomona Freeway. She said that the most direct way to her home would be on the Pomona Freeway and that she was heading home to meet Susan Mercurio to go to church pursuant to an earlier arrangement made by telephone after applicant had left her office. Applicant does not remember what caused the accident or where it took place. She does not remember the accident at all.

Under the aforesaid circumstances, we hold that the deviation was so minor as to not in any way affect applicant's "special errand" performed for her employer. In our opinion, and according to the testimony, applicant's first consideration was the purchase of the guest book and door prizes at the stationery store which was accomplished first. She then went to the dress shop which was two

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doors away from the stationery shop. We therefore hold that the applicant was on a special errand for her employer when she was injured in the accident and as such it constituted an exception to the "going and coming" rule. (See Trejo v. Maciel, 31 CCC 462, 239 C.A.2d 497.)

Respecting the Statute of Limitations, Mr. Kelly testified that he was aware of applicant's actions the next morning so that in our opinion, defendant employer was fully aware and notified of applicant's injury and accident. Furthermore, as applicant has testified when she returned to work again for defendant employer, the company again resumed the paying of her bills for medical treatment, and continued until applicant's employment was terminated on February 28, 1973. (See testimony of Kruse of October 3, 1973, Page 6, lines 2-3. See also Labor Code § 5405 and London Guaranty and Accident Co. v. IAC, [1925] 15 IAC 161, 92 Cal.App. 298, and Milieshah v. WCAB, 37 CCC 790, 26 Cal.App.3d 337.)

Accordingly, the evidence indicates that applicant's filing of an application for benefits was well within the one-year period prescribed by Labor Code § 5405, and in our opinion, defendant's argument concerning applicant sleeping on her rights (Petition, Page 27, lines 5-9), and being estopped from filing an application for benefits is moot and irrelevant.

Respecting applicant's permanent disability of 81-3/4%, we have reviewed the medical reports of Doctors Armon M. Sadoff dated August 21, 1973, Charles Aronberg, dated September 10, 1973, and Melvin L. Schwartz, dated September 21, 1973, and also the deposition of applicant dated June 27, 1973, and concur with the

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finding of an overall permanent disability of 81-3/4% as found by the referee in the Findings and Award issued on March 26, 1974.

As for the remaining issues raised by the defendant's petition, we are of the opinion that the referee in her Report on Petition, supra, has adequately answered the contentions of the defendant, and for the reasons stated therein, which reasons we adopt as our own, we are affirming the referee and denying defendant's petition.

In the course of its petition, defendant has requested that "full transcripts of the proceedings be prepared" and an opportunity given to the parties to supplement the Petition for Reconsideration, et cetera. However, in light of the entire record, even assuming petitioner's allegations regarding the evidence were true, they do not aid petitioner. We therefore see no need to delay these proceedings by granting petitioner's request.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration filed herein on April 17, 1974, be, and the same hereby is, DENIED.

WORKMEN'S COMPENSATION APPEALS BOARD

I CONCUR.

David Rose

557-0332

Arthur J. [illegible]

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA.

JUN 1 1 1974

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD.

Theodore L. Cornelius

5-9938

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12.

APPENDIX C

DECISION OF THE COURT OF APPEAL

BY MINUTE ORDER

POST CARD

SIX CENT STAMP HERE

CLERK'S OFFICE
Court of Appeal
SECOND DISTRICT

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LOS ANGELES, CALIF. 90012

JOEL D. SWANSON
4419 VAN NUYS BLVD. # 306
sherman oaks, 91403, California

Los Angeles, Cal. [illegible], *19*

TITLE { GEORGIA-PACIFIC CORP. vs. [illegible] } No. 44524

THE COURT: PETITION FOR WRIT OF REVIEW IS DENIED.

Reilly

CLAY ROBBINS, *Clerk*

APPENDIX "C" 43

APPENDIX D

DECISION OF THE SUPREME COURT
OF CALIFORNIA
BY MINUTE ORDER

RECEIVED
SEP 18 1974
LOWEN & SWANSON

Joel D. Swanson, Esq.
4419 Van Nuys Boulevard
Suite 306
Sherman Oaks, CA 91403

Yee Kelly
CLERK'S OFFICE, SUPREME COURT
4290 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

SEP 12 1974

I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 44524

Georgia-Pacific Corporation

or

W.C.A.B. et al.

Respectfully,

G. E. BISHEL
Clerk

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APPENDIX E

APPENDIX "E"

CONSTITUTIONAL PROVISIONS,

STATUTES, & REGULATIONS

U.S. CONSTITUTION, FOURTEENTH AMENDMENT

"...nor shall any state deprive any person of life, liberty, or property without due process of law;..."

U.S. CONSTITUTION, FOURTEENTH AMENDMENT

"...nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONSTITUTION, ARTICLE I, SECTION 10

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal, Claim Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; Pass any Bill of Attainder, ex post facto

Law or Law impairing the Obligation of Contracts (emphasis added) or grant any title or mobility."

U.S. CONSTITUTION, ARTICLE I

SECTION 8 CLAUSE 3

"The Congress shall have the Power;"

"To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;"

CALIFORNIA LABOR CODE, SECTION 5400

"Except as provided by sections 5402 and 5403, no claim to recover compensation under this division shall be maintained unless within thirty days after the occurrence of the injury which is claimed to have caused the disability or death, there is served upon the employer notice in writing, signed by the person injured or someone in his behalf, or in case

of the death of the person injured, by a dependent or someone in the dependent's behalf."

CALIFORNIA LABOR CODE, SECTION 5401

"The notice shall state:

a) The name and address of the person injured.

b) The time and the place where the injury occurred.

c) The nature of the injury.

CALIFORNIA LABOR CODE, SECTION 5402

"Knowledge of such injury, obtained from any source, on the part of an employer, his managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service

under section 5400."

CALIFORNIA LABOR CODE, SECTION 5403

"The failure to give notice under section 5400, or any defect or inaccuracy in a notice is not a bar to recovery under this division if it is found as a fact in the proceedings for the collection of the calim that the employer was not in fact misled or prejudiced by such failure."

CALIFORNIA LABOR CODE, SECTION 5404

"Unless compensation is paid within the time limited in this chapter for the institution of proceedings for its collection, the right to institute such proceedings is barred. The timely filing of an application with the appeals board by any party in interest for any part of the

compensation defined by Section 3207 renders this chapter inoperative as to all further claims by such party against the defendants therein named for compensation arising from that injury, and the right to present such further claims is governed by Sections 5803 to 5805, inclusive."

CALIFORNIA LABOR CODE, SECTION 5405

"The period within which may be commenced proceedings for the collection of the benefits provided by Articles 2 or 3, or both, of Chapter 2 of part 2 of this division is one year from:

a) The date of injury, or

b) The expiration of any period covered by payment under Article 3 of Chapter 2 of Part 2 of this division; or

c) The date of last furnishing any benefits provided for in Article 2 of Chapter 2 of Part 2 of this division."

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